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DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,
Respondents.

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

HAWAII, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Fourth and Ninth Circuits

BRIEF FOR THE NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION AND OTHERS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The National Asian Pacific American Bar Association ("NAPABA") is a national association of Asian Pacific American ("APA") attorneys, judges, law professors, and law students, representing the interests of over seventy-five national, state and local APA bar associations and nearly 50,000 attorneys who work in solo practices, large firms, corporations, legal services organizations, nonprofit organizations, law schools, and government agencies. Since its inception in 1988, NAPABA has served as a national voice for APAs, including Muslim Americans of Asian descent, in the legal profession and has promoted justice, equity, and opportunity for APAs. In furtherance of its mission, NAPABA opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law. NAPABA and its members have experience with and a unique perspective on attempts by the U.S. government to improperly restrict admission and immigration based on nationality or religion, of which the Executive Orders at issue are simply the latest versions.

The Arizona Asian American Bar Association is a voluntary bar association and a non-profit organization composed of legal professionals, law students, and members of the community interested in Asian-American issues. Its vision is to promote and advocate

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[1] All parties consented to the filing of this brief. No counsel for a party authored this brief in whole or in part; no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than NAPABA, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

for justice, equity, equality, inclusion, and opportunity for APAs in the Arizona legal profession and the community at large.

The Asian American Bar Association of Greater Chicago ("AABA Chicago") is the largest association of Asian American attorneys in the Chicago area. AABA Chicago opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law.

The Asian American Bar Association of Houston ("AABA of Houston") is a non-profit association of attorneys, judges, and law students of Asian-Pacific heritage or who have Asian-Pacific and APA interests. Founded in 1984, the AABA of Houston's membership reflects all aspects of Houston's APA legal community. The AABA of Houston promotes equality and justice for Asian Americans.

The Asian American Bar Association of New York ("AABANY") was formed in 1989 as a not-for-profit corporation to represent the interests of New York Asian American attorneys, judges, law professors, legal professionals, legal assistants, paralegals, and law students. The mission of AABANY is to improve the study and practice of law and the fair administration of justice for all by ensuring the meaningful participation of Asian Americans in the legal profession.

Established in 1992, the Asian American Bar Association of Ohio is the oldest association of APA attorneys in Ohio. In furtherance of its mission, it opposes discrimination and promotes the equitable treatment of all under the law.

The Asian American Bar Association of the Greater Bay Area ("AABA-GBA") is one of the largest Asian American bar associations in the nation and one of the largest minority bar associations in the State of California. From its inception in 1976, the AABA-GBA and its members have been actively involved in civil rights issues, community service, and the advancement of APAs in the legal profession.

The mission of the Asian American Criminal Trial Lawyers Association – Greater Bay Area is to improve the study and practice of criminal defense and to promote the fair administration of justice for all by ensuring the meaningful participation of Asian Americans in the legal profession.

Since its inception in 1984, the Asian American Lawyers Association of Massachusetts has devoted its energy and resources to serving the Asian American legal community and improving and facilitating the administration of law and justice.

The Asian Bar Association of Washington ("ABAW") is the professional association of APA attorneys, judges, law professors, and law students that strives to be a network for its members in Washington State. Created in 1987, the ABAW advocates for the legal needs and interests of the APA community, and represents over 200 APA attorneys in a wide-range of practice areas.

The Asian Pacific American Bar Association of Central Ohio ("APABA-CO") is a non-profit voluntary association for APA attorneys, judges, law professors, and law students, and other members of the legal community in the Central Ohio area. Since its inception, APABA-CO has advocated for and served the

legal needs and interests of the APA community in Central Ohio. The organization and those that it serves represent a significant number of individuals who actively contribute to the social and economic welfare of the United States.

The mission of the Asian Pacific American Bar Association of Colorado is to represent the interests of the APA community and attorneys; to speak on behalf of, and advocate, the interests and ideas of APA attorneys in Colorado; to foster the exchange of ideas and information among and between the organization's members and other members of the legal profession, the judiciary, and the legal community; to encourage and promote the professional growth of the members of the organization; to broaden opportunities for APA lawyers and law students; to present educational programs aimed at the needs of the practice of APA attorneys; to provide an opportunity for fellowship among the organization's members; to provide coordinated services to the Colorado community; to develop and encourage cooperation with NAPABA and with other organizations of minority attorneys; to provide a vehicle and forum for the unified expression of opinions and positions by the organization's members upon current social, political, economic, legal, or other matters or events of concern to the members of the organization; and to serve as a communication network among APA attorneys across the state.

The Asian Pacific American Bar Association of Indiana was formed on July 21, 2014, to promote and assist the interests of APAs in the legal profession and the community as a whole in Indiana. It is the Indiana affiliate for NAPABA.

The Asian Pacific American Bar Association of Los Angeles County is a member organization comprised of attorneys, judges, and law students throughout Los Angeles County. It has served as a voice for issues of concern to the Asian Pacific American community since its formation in 1998.

The Asian Pacific American Bar Association of Maryland is an association of APA attorneys and law students that serves the legal profession and seeks to promote justice, equity, and opportunity for APAs.

The Asian Pacific American Bar Association of Pennsylvania ("APABA-PA"), formerly the Asian American Bar Association of the Delaware Valley, is a non-profit organization founded in 1984 to serve a wide network of Asian Pacific American attorneys. APABA-PA is dedicated to the professional, economic, social and educational advancement of APA lawyers and to promote the administration of justice for the APA community.

The Asian Pacific American Bar Association of Silicon Valley's ("APABA-SV") mission is to foster professional development, advocacy and community involvement for Silicon Valley's APA legal community, and to promote justice and equality for all. Formed over thirty years ago, the APABA-SV is a forum for APA attorneys in the Silicon Valley to network, develop professional skills, participate in community service, take positions on issues affecting the APA community, and empower APAs in the Valley.

The Asian Pacific American Bar Association Solano County is a non-profit organization of lawyers, judges, and law students dedicated to supporting opportunity

for the community and increasing diversity in the areas of leadership in Solano County, California.

The Asian Pacific American Bar Association of South Florida ("APABA-SF") is a non-profit, voluntary bar organization of attorneys in Miami-Dade, Broward, and Palm Beach counties. APABA-SF's objectives include working towards civil rights reform, combating anti-immigrant agendas and hate crimes, and increasing diversity in federal, state, and local government.

The Asian Pacific American Bar Association of Tampa Bay supports its members, its community, its colleagues, and its profession in the Greater Tampa Bay area. It strives to create sustainable change and growth through dialogue, education, fellowship, and service.

The Asian Pacific American Bar Association of Virginia, Inc. is a diverse and non-partisan association of attorneys and those interested in matters of importance to the Asian Pacific American legal community. Its mission is to foster professional development, legal scholarship, advocacy and community involvement and to promote justice, equality, and opportunity for APAs and those who may seek its voice.

The Asian Pacific American Lawyers Association of New Jersey ("APALA-NJ") is a local association of APA attorneys in New Jersey. As the bar association that represents one of the fastest growing minority populations in the New Jersey, APALA-NJ continues to focus on ensuring greater representation of APA

attorneys in various sectors of the legal profession as well as in government and the state's judiciary.

The Asian Pacific American Women Lawyers Alliance is an organization that promotes inclusion, empowerment and advancement of APA women in the legal profession. It is devoted to advocating for, educating, mentoring, networking, and developing leadership within the profession and larger community.

The Asian/Pacific Bar Association of Sacramento ("ABAS") is a non-profit legal organization created to foster the exchange of ideas, to provide services to the general and local communities, and to protect people's civil and human rights. Since 1980, ABAS has been a force in advocating for diversity in the legal system, from encouraging APAs to join the legal profession, urging for diversity among the bench, and fighting for issues affecting those beyond APAs who are in need of equality in the justice system.

The Austin Asian American Bar Association ("AAABA") serves the Asian Pacific American legal community in Austin and the surrounding Central Texas region. AAABA supports equal treatment and justice for all under the law, and opposes any form of discrimination based on race, ethnicity, and religious beliefs.

Formed in 1986, the Chinese American Bar Association of Greater Chicago ("CABA"), is the first local bar association for attorneys of Asian descent in the Chicagoland area. As an organization of Chinese American attorneys, descended from immigrants or immigrants themselves, CABA has experienced firsthand the history of American exclusionary

immigration laws and detrimental impact therefrom. CABA rejects xenophobia and nativism, and discrimination on the basis of race, ethnicity, or national origin.

The Connecticut Asian Pacific American Bar Association ("CAPABA") is the only association focused towards all APA attorneys in Connecticut. CAPABA's membership consists of attorneys, law professors, law students, and other interested individuals. CAPABA's mission is to establish a support network for APA attorneys and communities and those interested in APA legal issues throughout the state of Connecticut.

The Federation of Asian Canadians – Ontario ("FACL") is a diverse coalition of Asian Canadian legal professionals who promote equity, justice, and opportunity for Asian Canadian legal professionals and the broader community. FACL fosters advocacy, community involvement, legal scholarship, and professional development.

The Filipino American Lawyers Association of Chicago is a professional network of attorneys, judges, law students, and supporters that facilitates career development, learning opportunities, and fellowship within the Chicagoland legal community. It provides access to colleagues across numerous practice areas and their related organizations, including law firms and corporations of all sizes, non-profits, and public sector employers.

The Filipino American Lawyers Association of New York opposes discrimination, including on the basis of race, religion, and national origin, and promotes the equitable treatment of all under the law.

The Filipino American Lawyers of San Diego is committed to ensuring that attorneys of color, particularly Filipino American attorneys, have access to equal opportunities in the legal profession. It aims to develop multicultural solutions, to foster diversification, and to sustain multicultural coalitions in all channels of the legal system.

The Filipino Bar Association of Northern California ("FBANC") is an organization of attorneys, judges, and law students dedicated to serving the Filipino community. Through the volunteer work of its members, FBANC offers various service programs, including regular, free legal clinics, professional development programs for attorneys, and mentorship for law students and young attorneys.

The objectives of the Filipino Lawyers of Washington ("FLW") are to foster the exchange of ideas and information among and between FLW members and other members of the legal profession, the judiciary, and the community; to encourage and promote the professional growth of the members of the FLW; to provide service to the general and local community; to encourage and promote diversity in the legal profession; to develop and encourage cooperation with other organizations of minority attorneys; to celebrate the Filipino culture; and to provide a vehicle and forum for the expression of opinions and positions by the FLW upon current social, political, economic, legal, or other matters, or events that concern its members.

The Japanese American Bar Association ("JABA") is the national bar association for Japanese American attorneys, with over 340 members across the United

States and Japan. As one of the oldest minority bar associations in the United States, JABA has been a strong advocate regarding civil rights matters, whether it affects its own community or others that are faced with inequality, discrimination, or oppression.

The Korean-American Bar Association for the Washington, D.C. Area ("KABA-DC") was established in 2009 to be the voice for Korean Americans in the legal profession in the Greater Washington, D.C. Metropolitan Area. KABA-DC promotes professional development, legal scholarship, advocacy, and community involvement.

The Korean American Bar Association of Chicago ("KABA-Chicago") is an organization of over 400 lawyers, law students, and government officials. Since 1993, KABA-Chicago has diligently worked together to help the Korean American and minority community in the greater Chicago area.

The Korean American Bar Association of Northern California ("KABANC") is an affiliate of NAPABA. Since its founding in the mid-1980s, KABANC has continued to serve and be a voice for the Korean-American and broader community on legal and other issues of interest which impact its community.

Founded in 1980, the Korean American Bar Association of Southern California has worked with the local community and its sister bars to fight for fairness and justice for all minorities under the law.

The mission of the Korean American Bar Association of Washington ("KABA-Washington") is to provide professional development, networking, and mentorship opportunities to its members and serve the

community as a resource by hosting professional, educational, and community events. KABA-Washington is committed to leadership, community, and service. KABA-Washington was founded with the purpose of serving the community.

The Korean American Lawyers Association of Greater New York ("KALAGNY") is a professional membership organization of attorneys and law students engaged with the issues affecting the Korean American community in greater New York. Incorporated in 1986, KALAGNY seeks to encourage the professional growth of its members as well as to provide legal support for the Korean American community.

The Louisiana Asian Pacific American Bar Association ("LAPABA") is a non-profit, professional legal organization for Louisiana attorneys, judges, law professors, and law students of Asian and Pacific heritage, and others who support the interests of APA lawyers, the legal profession, and APA communities. LAPABA provides a network for its members and serves the legal needs and interests of the community.

The Michigan Asian Pacific American Bar Association strongly and adamantly opposes any restriction based on nationality, religion, culture, creed, or race. The State of Michigan knows firsthand the evils that spur from xenophobia, as highlighted by the murder of Vincent Chin in 1982.

The Minnesota Asian Pacific American Bar Association is committed to promoting and supporting the personal and professional development of Asian American and Pacific American lawyers, judges, and

law students, serving as an advocate for the APA community in Minnesota, and promoting equal access to justice.

The Missouri Asian American Bar Association ("MAABA") is an organization of nearly 100 Asian American attorneys in the St. Louis area. MAABA was founded in 2001 with the mission to support the Asian American legal community, as well as the community at large.

The NAPABA - Hawaii Chapter ("NAPABA-Hawaii") is a Hawaii association of more than eighty APA attorneys, judges, and law professors. NAPABA - Hawaii's mission is to educate the public and to represent and to advocate for the interests of Asian and Pacific Americans and their communities in Hawaii.

The National Filipino American Lawyers Association ("NFALA") is a national association of Filipino American attorneys, judges, law professors, and law students dedicated to promoting the professional development, interests, and success of Filipino American legal professionals nationwide. NFALA is a voice for the national Filipino American legal community and strives to fight for equal opportunity and the rights of underserved minority groups.

The New Jersey Muslim Lawyers Association ("NJMLA") is the state's association of Muslim lawyers. Since its inception in 2006, the NJMLA has strived to promote fairness and inclusion in the legal field.

Since 1993, the Orange County Asian American Bar Association has fostered professional development, served as mentors to local law students, promoted

diversity in the private and public sectors, volunteered for legal clinics for low income and disadvantaged communities, and supported causes which affect and advance the needs of APAs and the public at-large.

The Orange County Korean American Bar Association was established in November 2005 to promote networking among minority attorneys, provide more effective legal counsel to the local Orange County community, to serve the Korean American community's legal needs with pro bono services, to promote the appointment of Korean American judges, and to assist law students in making the transition into full-time law practice.

The Oregon Filipino American Lawyers Association is a professional association of Filipino American judges, lawyers, law students and legal professionals, and supporters. Its members work together to promote equality and multiculturalism by increasing diversity within the Oregon State Bar and within the broader legal system, and to empower Oregon's Filipino American community by increasing its access to the legal system.

Since 1978 Pan Asian Lawyers of San Diego ("PALSD"), a non-partisan organization, has been dedicated to the advancement of Asian American attorneys in the legal profession, assisting Asian American communities and the wider San Diego community. However, PALSD does not limit its scope to benefit one single race or ethnic group.

The Philippine American Bar Association ("PABA") was founded more than 30 years ago to address legal issues affecting the Filipino-American community and

to support Filipino-American lawyers and law students in Southern California. PABA sponsors community legal clinics and also provides continuing legal education seminars and professional development opportunities for its members, and assists Filipino-American law students through mentorship programs and scholarships.

The Sacramento Filipino American Lawyers Association is a newly formed affiliate of NAPABA in the Eastern California Region. It seeks to represent, serve, and embody the highest standards of professionalism and ethics in the legal and local communities.

SABA Chicago, formally known as IABA Chicago, is a professional organization serving South Asian professionals and the Greater Chicago community over the past seventeen years. The organization was founded to advance the professional development and growth of a diverse member community, disseminate relevant information, and foster a culture of service within and beyond the legal community.

The South Asian Bar Association of Northern California was founded to ensure that Bay Area South Asian lawyers were provided an avenue to develop professionally, network among peers, and volunteer within the South Asian community.

The South Asian Bar Association of San Diego, in conjunction with the South Asian Bar Association national organization, has served as a voice of the South Asian community in San Diego and around the country.

The South Asian Bar Association of Southern California ("SABA-SC") is one of the oldest and largest South Asian bar associations in the country. SABA-SC strives to promote justice and fair treatment for Arab, African, Middle Eastern, Muslim, Sikh, and South Asian individuals and communities, and to foster goodwill, fellowship, and unity among these communities.

The South Asian Bar Association of Washington ("SABAW") represents South Asian lawyers and South Asians in the state of Washington. SABAW promotes South Asian lawyers and provides a platform for their unique voice in the legal industry.

The Southern California Chinese Lawyers Association is one of the country's oldest minority, and APA legal associations, and since its formation over 42 years ago, has sought to advance the legal, professional, and community interests of APAs in the Southern California region.

The Taiwanese American Lawyers Association ("TALA") is the national association of Taiwanese descent American lawyers. Since 1991, TALA has served the interests of Taiwanese American lawyers called to the bars of the various states, as well as advocate for the interests of Taiwanese Americans living in the United States and abroad. These interests include the promotion of justice, equity, and opportunity for Taiwanese Americans. Taiwanese Americans' religious environment is characterized by inclusive diversity and tolerance.

The Thai American Bar Association ("TABA") is national association of Thai-American and other APA

attorneys. Since its inception in 2011, TABA has sought to promote justice, equity, and opportunity for Thai Americans and other APAs.

The Vietnamese American Bar Association of Northern California was founded in 1998 to provide Vietnamese American attorneys with a vehicle for the unified expression of opinions and positions on matters of concern to all Vietnamese American attorneys, to encourage and promote the professional growth of its members, and to foster the exchange of ideas and information among its members and with the community at large.

The Vietnamese American Bar Association of Washington is the Vietnamese American Bar Association's local association in Washington. It serves as a voice for the Vietnamese community.

SUMMARY OF THE ARGUMENT

APAs are acutely familiar with the impact of exclusionary immigration laws, having long been the subjects of systematic and expansive restrictions driven by racial, ethnic, and religious animus. These historical laws not only excluded people from Asian countries, but hurt those already in the United States by legitimizing and validating ugly stereotypes and inequalities. APAs know the lasting pain and injury that result from the use of national origin as a basis for preference or discrimination in immigration laws.

The Revised Order is an unwelcome return to a pre-Civil Rights Era approach to immigration when prospective immigrants were excluded based upon their national origin, which served as a pretext for discrimination on the basis of the predominant races,

religions, and ethnicities in those countries. Challenges to the Revised Order are informed by both evidence of the order's history and purpose, and by the country's historical experience using nationality-based restrictions in the immigration context as a proxy for discrimination on the basis of race and religion.

Amici respectfully request the Court affirm the decisions of the Fourth and Ninth Circuits enjoining enforcement of the Revised Order, or, at a minimum, make permanent the result of this Court's June 26, 2017 order.

ARGUMENT

I. Executive Order History.

On January 27, 2017, President Donald J. Trump issued Executive Order No. 13,769, 82 Fed. Reg. 8977 (Feb. 1, 2017), titled, "Protecting the Nation from Foreign Terrorist Entry into the United States" ("Original Order"). The Original Order was temporarily enjoined by multiple courts, including by the U.S. District Court for the Western District of Washington, which the Ninth Circuit declined to stay. *Washington v. Trump*, 847 F.3d 1151, 1161–62 (9th Cir. 2017) (per curiam).

On March 6, 2017, the President signed Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017), with the same title ("Revised Order"), replacing the Original Order. It had many of the same restrictions, including one on issuing visas to citizens of six Muslim-majority countries. *See* Revised Order §§ 1, 2, 3, 9, 12. Challenges to the Revised Order are informed by both evidence of the order's history and purpose, and by the country's historical experience using nationality-based

restrictions in the immigration context as a proxy for discrimination on the basis of race and religion.[2]

II. The United States Has Renounced Nationality-Based Discrimination in Immigration Due to Past Abuse and Injustice that Should Inform Any Assessment of the Executive Orders.

During the heart of the Civil Rights Era, Congress enacted, and President Lyndon Johnson signed, the Immigration and Nationality Act of 1965, Pub. L. No. 89-236, 79 Stat. 911, to prohibit preference, priority, or discrimination in the issuance of immigrant visas due to "race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A). This provision marked a firm break from the invidious discrimination in historical immigration laws. It sought to prevent the country from repeating those errors. Nevertheless, the Revised Order discriminates on the basis of nationality and warrants close scrutiny, particularly given the Fourth Circuit's finding that "in this highly unique set of circumstances, there is a direct link between the President's numerous campaign statements promising a Muslim ban that targets territories, the discrete action he took only one week into office executing that exact plan, and [the Revised Order], the 'watered down' version of that plan that 'get[s] just about everything,' and 'in some ways, more.'" *Int'l Refugee Assistance Project v. Trump ("IRAP")*, 857 F.3d 554, 599–600 (4th Cir. 2017) (J.A. 332–33).

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[2] The history of the Executive Orders is set forth in more detail in Respondent's Brief. Res.'s Br. at 5–10, *Trump v. Hawaii*, No. 16-1540 (U.S. Sep. 11, 2017).

A. The Revised Order Echoes Historical Discrimination in the Application of Immigration Laws Based upon National Origin.

Asians first began migrating to the United States mainland in significant numbers in the mid-1800s, led by Chinese nationals. *See* Bill Ong Hing, *Making and Remaking Asian America Through Immigration Policy, 1850–1990* 19–20 (1993). As conditions weakened in their homelands, economic opportunity beckoned Asian laborers to the United States. The discovery of gold and westward expansion fueled demand for low-wage labor. Industrial employers actively recruited Chinese nationals to fill some of the most demanding jobs, particularly in domestic service, mining, and railroad construction. *Id.* at 20.

However, the resulting growth in the immigrant labor population provoked anger and resentment among native-born workers eager for work and better wages. *Id.* at 21. Chinese immigrants, in particular, became targets of fierce hostility and violence. The so-called "Yellow Peril" refers to the widespread characterization of Chinese immigrants as "unassimilable aliens" with peculiar and threatening qualities. *See* Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of "Foreignness" in the Construction of Asian American Legal Identity*, 4 Asian Am. L.J. 71, 86–89 (1997).

Congress catered to this xenophobia and racism by passing a series of laws that discouraged and ultimately barred immigration from China and other Asian countries. These laws marked the first time the federal government broadly enacted and enforced an

immigration admissions policy that defined itself based on whom it excluded.[3] The first such law came toward the end of Reconstruction, when Congress enacted the Page Act. Act of Mar. 3, 1875, ch. 141, 18 Stat. 477 (repealed 1974). Barring the entry of Asian immigrants considered "undesirable," the Page Act was largely enforced against Asian women, who were *presumed to be prostitutes* simply by virtue of their ethnicity. *See* George Anthony Peffer, *Forbidden Families: Emigration Experiences of Chinese Women Under the Page Law, 1875–1882*, 6 J. Am. Ethnic Hist. 28, 28–46 (1986).

A few years later, Congress responded to persistent anti-Chinese fervor with the Chinese Exclusion Act on May 6, 1882, 22 Stat. 58, the first federal law to exclude people on the basis of their nationality. On the premise that the "coming of Chinese laborers . . . endanger[ed] the good order" of areas in the United States, the Act provided that "[i]t shall not be lawful for any Chinese laborer to come, or, having so come after the expiration of said ninety days, to remain within the United States." *Id.* § 1. The Chinese Exclusion Act halted immigration of Chinese laborers for ten years, prohibited Chinese nationals from becoming U.S. citizens, and uniquely burdened Chinese laborers who were already legally present and wished to leave and re-enter the United States. Congress first extended the exclusionary period by ten years in 1892 with the

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[3] Naturalization and citizenship laws have always limited the scope of who could be a citizen, but the same was not so for rules on entry to the United States. The Naturalization Act of 1870, 16 Stat. 254, which barred Asians from naturalization, prefaced the era of Asian exclusion.

Geary Act, 27 Stat. 25, and then indefinitely in the Act of April 29, 1902, Pub. L. No. 57-90, 32 Stat. 176.

After the Chinese exclusion laws foreclosed employers from importing *Chinese* laborers, immigrants from Japan, Korea, India, and the Philippines began coming in larger numbers. *See* Hing, *supra*, at 27–31. As with Chinese nationals before them, these immigrants encountered strong nativist opposition as their numbers rose. *Id.* at 32.

The exclusionary policies of the U.S. government enforced and validated xenophobic and racist sentiments and enabled violent backlash. Nativist Americans established the Asiatic Exclusion League in the early 20th century to prevent immigration by people of Asian origin to the United States and Canada, which had a similar nationality-based system of immigration at the time.[4] On September 4, 1907, the Asiatic Exclusion League and labor unions led the "Bellingham Riots" in Bellingham, Washington, to expel South Asian immigrants from local lumber mills. *See 1907 Bellingham Riots*, Seattle Civil Rights & Labor History Project, http://depts.washington.edu/civilr/bham_intro.htm; *see also* Erika Lee, *The Making of*

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[4] *See* Victor M. Hwang, *Brief of* Amici Curiae *Asian Pacific Islander Legal Outreach and 28 Asian Pacific American Organizations, in support of all respondents in the Six Consolidated Marriage Cases, Lancy Woo and Cristy Chung, et al., Respondents, v. Bill Lockyer, et al., Appellants on Appeal to the Court of Appeal of the State of California, First Appellate District, Division Three*, 13 Asian Am. L.J. 119, 132 (2006) (the Asiatic Exclusion League was formed for the stated purpose of preserving "the Caucasian race upon American soil . . . [by] adoption of all possible measures to prevent or minimize the immigration of Asiatics to America" (internal quotation marks omitted)).

Asian America: A History 163–64 (2015). Herman Scheffauer's *The Tide of the Turbans* noted that: "Again on the far outposts of the western world rises the spectre of the Yellow Peril and confronts the affrighted pale-faces," and lamented "a threatening inundation of Hindoos over the Pacific Coast," which it proposed to address by legislation. 43 Forum 616 (1910).[5]

Congress responded to native concerns about these growing populations in the same way that it had to the perceived threat of Chinese immigrants. The Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874, created the "Asiatic Barred Zone," which extended the Chinese exclusion laws to include nationals of other countries in South Asia, Southeast Asia, the Polynesian Islands, and parts of Central Asia.[6] The racial undertones of this act were such that, in addressing whether a "high-caste Hindu, of full Indian blood" was a "white person," eligible to naturalize under the laws at the time, the Supreme Court inferred from it that Congress would have "a similar [negative] attitude toward Asiatic naturalization." *United States v. Thind*, 261 U.S. 204, 206, 215 (1923).[7]

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[5] The term "Hindoo" or "Hindu" was applied to all South Asian persons, regardless of faith. The "Tide of Turbans" referenced the distinctive turban worn by members of the Sikh faith.

[6] An executive agreement, the Gentlemen's Agreement, reached in 1907 and 1908, restricted the immigration of Japanese laborers, as well as Koreans, whose nation was under Japanese forced occupation between 1910 and 1945. *See* Hing, *supra*, at 29.

[7] Bhagat Singh Thind was a member of the Sikh faith, though described as "Hindu" as explained in Footnote 6. The question posed was whether a South Asian of Caucasian ancestry was distinct from "Asiatic" or other racial groups under the prevailing racial theories and qualified as "white" under U.S. law. *See Thind*,

A few years later, the Immigration Act of 1924 (the "Asian Exclusion Act"), Pub. L. No. 68-139, 43 Stat. 153, imposed immigration caps based upon national origin and prohibited immigration of persons ineligible to become citizens, which effectively barred people from Asian countries from immigrating altogether. As explained by an opponent of the law, its nationality restrictions were driven by animus against religious and ethnic groups—such as Jews—by restricting immigration from countries where they lived in larger numbers, just as the law treated other "inferior peoples":

> Of course the Jews too are aimed at, not directly, because they have no country in Europe they can call their own, but they are set down among the inferior peoples. Much of the animus against Poland and Russia, old and new, with the countries that have arisen from the ruins of the dead Czar's European dominions, is directed against the Jew.

65 Cong. Rec. 5929–32 (1924) (Statement by Rep. Clancy).

Because of then-U.S. jurisdiction over the Philippines, Filipinos were still able to migrate to the United States. Lee, *supra*, at 157. However, U.S. citizenship remained out of reach and Filipinos could not escape racial animus, as they were seen to present an economic threat and to "upset the existing racial hierarchy between whites and nonwhites." *Id.* at 157, 185. Anti-Filipino agitation culminated in passage of

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261 at 209–14 (Justice Sutherland's discussion of theories of racial classification).

the Philippine Independence Act, Pub. L. No. 73-127, 48 Stat. 456 (1934), which granted independence to the Philippines and changed the status of Filipinos from U.S. nationals to "aliens," making them subject to the same restrictions as other Asian groups. The next year, Filipino nationals already in the United States became subject to deportation and repatriation. Filipino Repatriation Act, Pub. L. No. 74-202, 49 Stat. 478 (1935).[8]

The exclusionary racism and xenophobia underpinning these laws crystallized and escalated during World War II, when the U.S. government forcibly incarcerated over 110,000 permanent residents and U.S. citizens in internment camps on the basis of their Japanese ancestry.[9]

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[8] The idea, still prevalent today, that race keeps one from being an American particularly resonated with Filipinos affected by the new restrictions: "We have come to the land of the Free and where the people are treated equal only to find ourselves without constitutional rights . . . . We . . . did not realize that our oriental origin barred us as human being in the eyes of the law." Lee, *supra*, at 185 (citing June 6, 1935 letter from Pedro B. Duncan of New York City to the Secretary of Labor and other letters).

[9] *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942). For a further discussion of the improper justification for the Japanese American incarceration, see brief of the Fred T. Korematsu Center for Law and Equality, *et al.* as *Amicus Curiae*, *State of Hawaii, et al., v. Donald J. Trump, et al.*, No. 17-15589 (9th Cir. Apr. 21, 2017).

B. In 1965, Congress and President Johnson Dismantled Quotas Based upon Nationality and Barred Distinctions Based upon "Race, Sex, Nationality, Place of Birth, or Place of Residence."

Starting during World War II and continuing over the next twenty years, Congress gradually loosened restrictions on Asian immigration to further the interests of the United States on the world stage.

First, at the urging of President Franklin D. Roosevelt, who called the exclusion of Chinese citizens by the United States "a historic mistake," Lee, *supra*, at 256, Congress repealed the Chinese exclusion laws with the Magnuson Act of 1943, Pub. L. No. 78-199, 57 Stat. 600. In 1946, the Act of July 2, 1946, Pub. L. No. 79-483, 60 Stat. 416, allowed 100 Filipinos and Indians, each, to immigrate per year and permitted their naturalization.[10]

Then, in 1952, the Immigration and Nationality Act, Pub. L. 82-414, 66 Stat. 163, repealed the Asiatic Barred Zone and eliminated the racial bar on citizenship. Nevertheless, it left in place national origin quotas intended to heavily favor immigration from Northern and Western Europe, with unmistakable racial, religious, and ethnic consequences.

After decades of highly regimented immigration quotas tied to prospective immigrants' countries of origin, the Immigration and Nationality Act of 1965,

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[10] This bill allowed Dalip Singh Saund to become a naturalized citizen. He would become the first APA Member of Congress. *See* Lee, *supra*, at 373–75, 392.

Pub. L. 89-236, 79 Stat. 911, marked a dramatic turning point. Like Presidents Harry S. Truman and Dwight D. Eisenhower before him, President John F. Kennedy opposed the national origins quota system, calling it "nearly intolerable" and inequitable. *Remarks to Delegates of the American Committee on Italian Migration*, The American Presidency Project (June 11, 1963), *available at* http://www.presidency.ucsb.edu/ws/?pid=9269. In the Fourth Circuit, Judge Wynn noted criticisms of the national origins system by Presidents Kennedy and Johnson as incompatible with "our fundamental belief that a man is to be judged—and judged exclusively—on his worth as a human being." *IRAP*, 857 F.3d at 627 (Wynn, J. concurring) (quoting Special Message to the Congress on Immigration, 1965 Pub. Papers 37, 37, 39 (Jan. 13, 1965)) (J.A. 293).

In 1965, Congress answered these calls, abolishing the national origins quotas in an act signed by President Johnson and providing that "[e]xcept as specifically provided" in certain subsections, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, nationality, place of birth, or place of residence." 8 U.S.C. § 1152(a)(1)(A).[11] In signing the bill, as Judge Wynn noted, President Johnson proclaimed that hereinafter

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[11] The excepted subsections address "[p]er country levels for family-sponsored and employment-based immigrants," 8 U.S.C. § 1152(a)(2), statutory creation of "special immigrant" categories for preferred treatment (e.g., certain Panamanian nationals who worked in the Canal Zone, etc.), 8 U.S.C. § 1101(a)(27), admission of immediate relatives of U.S. citizens, 8 U.S.C. § 1151(b)(2)(A)(i), and the statutorily created system of allocation of immigrant visas, 8 U.S.C. § 1153.

"immigrants would be permitted to come to America 'because of what they are, and *not because of the land from which they sprung*.'" *IRAP*, 857 F.3d at 627 (Wynn, J. concurring) (quoting with emphasis Special Message to the Congress on Immigration, 1965 Pub. Papers 37, 37, 39 (Jan. 13, 1965)) (J.A. 294).

The legislative history of 8 U.S.C. § 1152(a)(1)(A) confirms that Congress intended to reject and repudiate the "national origins system" as an inequitable and irrelevant basis for admission decisions. For instance, a member of Congress opined that the system "embarrasse[d] us in the eyes of other nations, . . . create[d] cruel and unnecessary hardship for many of our own citizens with relatives abroad, and . . . [was] a source of loss to the economic and creative strength of our country." Oscar M. Trelles II & James F. Bailey III, *Immigration Nationality Acts, Legislative Histories and Related Documents 1950–1978* 417 (1979). Attorney General Robert F. Kennedy lamented that the national origins system harmed citizens with relatives abroad, "separat[ing] families coldly and arbitrarily." *Id.* at 411. Indeed, it confirms Congress overwhelmingly regarded the system as an outdated, arbitrary, and above all, un-American, basis upon which to decide whom to admit into the country.

Statements in the legislative history resoundingly denounced the use of nationality in immigration decisions, as it furthered the un-American belief that individuals born in certain countries were more desirable or worthy of admission than others. Prior to 1965, nationality-based immigration restrictions excluded nationals of Asian countries based upon unfounded and unjust stereotypes that conflated race,

ethnicity, and religion. Several members of Congress echoed President Kennedy's sentiments, when in 1963 he wrote in a letter to Congress:

> The use of a national origins system is without basis in either logic or reason. It neither satisfies a national need nor accomplishes an international purpose. In an age of interdependence among nations, such a system is an anachronism, for it discriminates among admission into the United States on the basis of accident of birth.

Id. at 2 (quoting Kennedy, John F., 1964 Pub. Papers, 594–97 (July 23, 1963)).

President Kennedy's reference to prohibiting discrimination in "*admission* into the United States," confirms the contemporaneous understanding that the 1965 Act foreclosed discrimination in *admission*, not just for immigration. Indeed, it would be perverse to provide more protection to foreign nationals seeking to immigrate to the United States than to those merely seeking to visit family. Not surprisingly, during Congressional hearings on the 1965 Act, Attorney General Kennedy contended that abolition of the national origins system sought:

> [N]ot to penalize an individual because of the country that he comes from or the country in which he was born, not to make some of our people feel as if they were second-class citizens. . . . [Abolition of the national origins system] will promote the interests of the United States and will remove legislation which is a continuous

> insult to countries abroad, many of whom are closely allied with us.

Id. at 420. If certain citizens' relatives cannot visit from abroad, or are prohibited from obtaining visas on equal footing with those of others, they cannot help but feel that they are themselves "second-class citizens" in the eyes of the U.S. government.

In light of this history, the reference in 8 U.S.C. § 1152(a)(1)(A) to the prohibition against discrimination in the "issuance of immigration visas" must not be read to sanction discrimination in issuance of nonimmigrant visas. If it were, the Executive could discriminate in the very manner that the act sought to prevent.

C. By Promoting Discrimination, the Executive Orders are Contrary to the Statutory Language and Purpose.

Today, nearly two-thirds of APAs are foreign-born. Karthick Ramakrishnan & Farah Z. Ahmad, *State of Asian Americans and Pacific Islanders Series: A Multifaceted Portrait of a Growing Population* 23, AAPIDATA (Sept. 2014), http://aapidata.com/wp-content/uploads/2015/10/AAPIData-CAP-report.pdf. The experience of many APA families in the United States began with the opportunity to immigrate that was denied to their ancestors. Nevertheless, the harmful legacies of those earlier laws—which tore apart families, denied the right to naturalize and the rights that accompany citizenship to lawful immigrants, and validated xenophobia, racism, and other invidious stereotypes—persist.

Indeed, Congress recently reaffirmed its condemnation of the Chinese exclusion laws with the passage of resolutions expressing regret for those laws. S. Res. 201, 112th Cong. (2011); H.R. Res. 683, 112th Cong. (2012). The Senate resolution explicitly recognized that "[the] framework of anti-Chinese legislation, including the Chinese Exclusion Act, is incompatible with the basic founding principles recognized in the Declaration of Independence that all persons are created equal." S. Res. 201, 112th Cong. (2011).

As the Maryland District Court hearing a challenge to the Revised Order recognized, the Immigration and Nationality Act of 1965 "was adopted expressly to abolish the 'national origins system' imposed by the Immigration Act of 1924," that aimed to "'maintain to some degree the ethnic composition of the American people.'" *IRAP*, 2017 WL 1018235, at *8 (quoting H.R. Rep. No. 89-745, at 9 (1965)) (J.A. 139). This accords with the D.C. Circuit's holding that "Congress could hardly have chosen more explicit language" in barring discrimination against the issuance of a visa because of a person's nationality or place of residence. *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State* ("*LAVAS*"), 45 F.3d 469, 472–73 (D.C. Cir. 1995) (finding "Congress has unambiguously directed that no nationality-based discrimination shall occur"); *see also Abdullah v. INS*, 184 F.3d 158, 166–67 (2d Cir. 1999) ("[T]he Constitution does 'not permit an immigration official, in the absence of [lawful quota] policies, to . . . discriminate on the basis of race and national origin.'") (citing *Bertrand v. Sava*, 684 F.2d 204, 212 n.12 (2d Cir. 1982)); *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir. 1966) (concluding that nationality is an

impermissible basis for deportation and "invidious discrimination against a particular race or group" is prohibited as a basis for deportation). Consistent with the contemporaneous and monumental Civil Rights Act of 1964, which outlawed discrimination on the basis of "race color, religion, sex, or national origin," and the Voting Rights Act of 1965, the Immigration and Nationality Act of 1965 marked a departure from the nation's past reliance upon such characteristics to restrict entry into the country. *See Olsen v. Albright*, 990 F. Supp. 31, 38 (D.D.C. 1997) (noting that policies that discriminate "based on impermissible generalizations and stereotypes" contravene Section 1152(a)(1)(A)); Gabriel J. Chin, *The Civil Rights Revolution Comes to Immigration Law: A New Look at the Immigration and Nationality Act of 1965*, 75 N.C. L. Rev. 273 (1996).

Both Executive Orders expressly discriminate against applicants for entry based on nationality and are premised on a construction of Section 1182(f) that would obviate limits Congress imposed on the Executive's inadmissibility determinations under Section 1182(a)—precisely what Congress and President Johnson specified by statute the Executive Branch could *not* do. Because Congress has already provided "specific criteria for determining terrorism-related inadmissibility," *see Kerry v. Din*, 135 S. Ct. 2128, 2140 (2015) (Kennedy, J., concurring), any reliance upon more general language in 8 U.S.C. § 1182(f) is misplaced. Section 1182(f) permits both denial of entry and restrictions upon entry "[w]henever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States." If

this were to bar issuance of visas to citizens of six nations on the basis of their nationality as potential terrorists, it would defy Justice Kennedy's controlling opinion in *Din*, which explains that the Executive's authority to exclude an individual from admission on the basis of claimed terrorist activity "rest[s] on a determination that [he or she does] not satisfy the . . . requirements" of 8 U.S.C. § 1182(a)(3)(B). *Id.* Similarly, other courts have held that Section 1182(f) "provides a safeguard against the danger posed by any particular case or class of cases *that is not covered by one of the categories in section 1182(a).*" *Abourezk v. Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (concluding that authority under one subsection cannot "swallow" the limitations imposed by Congress on inadmissibility under other parts of Section 1182) (emphasis added), *aff'd mem.*, 484 U.S. 1 (1987). Applying the same principle of construction, *Allende v. Shultz* held that subsections of 8 U.S.C. § 1182(a) could not be rendered superfluous by interpretation of others. 845 F.2d 1111, 1118 (1st Cir. 1988).

The Ninth Circuit correctly rejected the government's argument that Section 1182(f)'s authority overrides the protections in Section 1152(a)(1)(A):

> Under the Government's argument, the President could circumvent the limitations set by § 1152(a)(1)(A) by permitting the issuance of visas to nationals of the six designated countries, but then deny them entry. Congress could not have intended to permit the President to flout § 1152(a) so easily. . . .
>
> To avoid this result, and to give effect to § 1152(a)(1)(A), the section "is best read to

> prohibit discrimination throughout the visa process, which must include the decision whether to admit a visa holder upon presenting the visa."

State of Hawaii v. Trump, 859 F.3d 741, 777 (9th Cir. 2017) (J.A. 1212).

D. The History of Discrimination Informs the Present Dispute.

The 1965 amendments to the Immigration and Nationality Act sought to constrain executive authority to afford any preference, priority, or discrimination in immigration based on nationality, place of birth, or place of residence, among other characteristics. Pub. L. No. 89-236 (1965) (codified at 8 U.S.C. § 1152(a)(1)(A)). The D.C. Circuit has interpreted this provision to apply to admission as well, holding that "Congress has unambiguously directed that no nationality-based discrimination shall occur." *LAVAS*, 45 F.3d at 472–73.

Thus, the President lacked statutory authority or discretion to issue the Revised Order. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (observing that the President's power is at "its lowest ebb" when it is "incompatible with the expressed . . . will of Congress"). Congress relegated this kind of discrimination into the past in 1965, aligning our immigration laws with notions of equality etched into the nation's conscience during the Civil Rights Era.

This Court, in *Din*, recognized that courts "look behind" the government's express rationale where there is "an affirmative showing of bad faith." 135

S. Ct. at 2141; *see also Am. Acad. of Religion v. Napolitano*, 573 F.3d 115, 137 (2d Cir. 2009) (recognizing that a well-supported allegation of bad faith could render an immigration decision not *bona fide*). The long history of abusing nationality-based restrictions on immigration to target other groups should also inform the Court's consideration of whether the Revised Order comports with the Establishment Clause of the United States Constitution. U.S. Const. amend. I, cl. 1; *see Larson v. Valente*, 456 U.S. 228, 244, 254–55 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."); *see also Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977).

From statements made by the President, before and after his inauguration, the Fourth Circuit found "direct, specific evidence [that] . . . President Trump's desire to exclude Muslims from the United States" motivated the Executive Orders. *IRAP*, 857 F.3d at 595 (J.A. 222). It also found that the order "cannot be divorced from the cohesive narrative linking it to the animus that inspired it." *Id.* at 601 (J.A. 236).[12]

The barely concealed animus behind the Executive Orders is even more glaring when set against the long

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[12] Although the language of the Revised Order is more facially neutral than that of the Original Order, the motivating religious animus remains clear. The President acknowledged as much in referring to the Revised Order as "a watered-down version" of its predecessor. Michael D. Shear, *Who Undercut President Trump's Travel Ban? Candidate Trump*, N.Y. Times (Mar. 16, 2017), https://www.nytimes.com/2017/03/16/us/politics/trump-travel-ban-campaign.html.

history of such discrimination that Congress has expressly tried to stamp out, and ignoring such evidence would abet pretextual discrimination between people of different religions and nationalities.

Rather than exhaustively recite the extensive evidence of the Revised Order's foundation in animus, which cannot escape the Court's notice, we submit that this Court should consider the evident deleterious effect the Executive Orders have had on U.S. citizens from the affected nations and Muslims. As the Fourth Circuit observed in echoing earlier observations of this Court, "[w]hen the government chooses sides on religious issues, the 'inevitable result' is 'hatred, disrespect and even contempt' towards those who fall on the wrong side of the line." *IRAP*, 857 F.3d at 604 (quoting *Engel v. Vitale*, 370 U.S. 421, 431 (1962)). These fears were borne out in a measureable uptick in hate crimes and harassment against Muslims in the first half of 2017, for which the Council on American-Islamic Relations ("CAIR") found "ethnicity or national origin" to be the most common "trigger." *CAIR Report Shows 2017 on Track to Becoming One of Worst Years Ever for Anti-Muslim Hate Crimes*, Council on American-Islamic Relations (June 17, 2017), https://www.cair.com/press-center/press-releases/14476-cair-report-shows-2017-on-track-to-becoming-one-of-worst-years-ever-for-anti-muslim-hate-crimes.html. Indeed, the deputy director of CAIR in Chicago was threatened by a man charged with a felony hate crime for leaving messages that began: "Hey. Guess what? This is America calling, ... You are not welcome here. Take your [double expletive] back to Syria. We will kill you." William Lee, *Man charged with hate crime in phone threat to Muslim-*

American advocate: 'We will kill you', Chicago Tribune (June 17, 2017) (alteration in original), http://www.chicagotribune.com/news/local/breaking/ct-man-charged-with-phone-threat-to-muslim-american-advocate-we-will-kill-you-20170617-story.html.

As Judge Wynn's concurrence concluded, such invidious "discrimination contravenes the authority Congress delegated to the President in the Immigration and Nationality Act . . . 8 U.S.C. § 1101 *et seq.*, and it is unconstitutional under the Establishment Clause." *IRAP*, 857 F.3d at 612 (Wynn, J. concurring).

Based on their long history of experiencing discrimination, APAs well understand the harmful effects of the President's actions and urge this Court to not allow the Executive Orders to stand.

CONCLUSION

The U.S. government severely restricted and at times prohibited the entry, immigration, and naturalization of people from Asian nations for nearly a century. In 1965, Congress and the President recognized that this practice reflected animus toward people of races, ethnicities, and religions that prevailed in those countries and restricted the use of nationality in immigration. Many APAs are in the United States today because Congress prohibited such discrimination during the Civil Rights Era, when the harm and injustice of government-sanctioned discrimination on the basis of "race, sex, nationality, place of birth, [and] place of residence" could no longer be countenanced.

The Revised Order seeks to side-step these restrictions on nationality-based discrimination, as well as the constitutional establishment clause and

equal protection rights they reflect, to discriminate against nationals of six Muslim-majority countries. This Court should prevent the President from exercising such authority, lest it presage a return to the era of invidious discrimination that Congress sought to foreclose more than fifty years ago.

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